

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

MICHAEL MALLOIAN,

Plaintiff,

vs.

INFINITY INSURANCE COMPANY, an  
Indiana corporation, et al.,

Defendants.

CASE NO. 10cv1888 DMS (BGS)

**ORDER GRANTING IN PART  
AND DENYING IN PART  
DEFENDANT'S MOTION FOR  
SUMMARY JUDGMENT OR, IN  
THE ALTERNATIVE, PARTIAL  
SUMMARY JUDGMENT**

[Docket No. 21]

This matter comes before the Court on Defendant's motion for summary judgment. Plaintiff has filed an opposition to the motion, and Defendant has filed a reply. For the reasons discussed below, the Court grants in part and denies in part Defendant's motion.

**I.**

**BACKGROUND<sup>1</sup>**

Plaintiff Michael Malloian is a former employee of Defendant Infinity Insurance Company. Plaintiff began working for Defendant in November 2000 as an Investigator Level I in the Special Investigations Unit ("SIU"). The purpose of the SIU is "to detect and deter insurance fraud that is known to exist in the industry." (Mem. of P. & A. in Supp. of Mot. at 2.) Plaintiff was later promoted to SIU Investigator Level II, and in May 2002 he became an SIU Manager.

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<sup>1</sup> The Court notes that some of the following facts are disputed. However, for purposes of the present motion, the Court construes these facts in the light most favorable to Plaintiff, and draws all reasonable inferences in his favor.

1       In late 2008, Defendant began implementing changes to its SIU division. For instance,  
2 Defendant began using a new computer program to identify fraud indicators in Defendant's claims.  
3 Defendant also began implementing a "pure investigation" model for SIU. This model required SIU  
4 investigators to focus exclusively on investigating claims rather than adjusting claims. Defendant also  
5 eliminated the use of outside counsel to conduct Examinations Under Oath, leaving that task to the SIU  
6 investigators.

7       While these changes were being implemented, Plaintiff also experienced a change in his  
8 immediate supervisor: Joe Descher. Prior to becoming Plaintiff's supervisor, Mr. Descher was  
9 responsible for the SIU Eastern Region. In addition to his supervisory responsibilities over Plaintiff,  
10 Mr. Descher was now responsible for the entire Western Region, and was also the Assistant Vice  
11 President of SIU.

12       In July 2009, Plaintiff attended a meeting with Descher, Bill Dibble, Senior Vice President of  
13 Claims, and Tony Smarelli, Vice President of Claims. Plaintiff claims that during that meeting, Descher  
14 stated he "wanted the West Coast to focus more on increasing the number of denials and withdrawals  
15 of claims." (*Id.* at 5.) Plaintiff responded that they should treat the claims on a "case by case" basis.  
16 (*Id.*) Subsequently, Descher told the SIU managers to set goals and objectives for denying claims. (*Id.*)

17       In May 2010, Descher generated a set of objectives and asked Plaintiff to distribute them to all  
18 investigators in his unit. (*Id.*) Those objectives contained measurements of denied and withdrawn  
19 claims for each individual investigator. (*Id.*) Plaintiff refers to these measurements as "impact ratios."  
20 (*Id.*) According to these measurements, investigators were expected to deny or have withdrawals on  
21 fifty percent or more of claims investigated. (*Id.*)

22       In the months preceding the issuance of these objectives, Plaintiff had two additional incidents  
23 with Descher. The first occurred in January 2010, when Plaintiff requested that one of his investigators  
24 be allowed to work overtime. Descher refused that request. The second incident occurred in April  
25 2010. That incident involved Descher's use of the term "nigger" to describe an African American SIU  
26 investigator. Plaintiff objected to Descher's use of that term.

27       On June 3, 2010, Defendant, through Smarelli, terminated Plaintiff's employment.  
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1 Plaintiff filed the present case on August 11, 2010, in San Diego Superior Court. In the  
 2 Complaint, Plaintiff alleges claims for wrongful termination and retaliation. Defendant removed the  
 3 case to this Court on September 10, 2010.

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5 **II.**

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**DISCUSSION**

7 Defendant moves for summary judgment, or in the alternative, partial summary judgment. It  
 8 asserts there are no genuine issues of material fact on any of Plaintiff's claims, and it is entitled to  
 9 judgment as a matter of law. Plaintiff disputes that there are no genuine issues of material fact, and that  
 10 Defendant is entitled to summary judgment.

11 **A. Summary Judgment**

12 Summary judgment is appropriate if there is no genuine issue as to any material fact, and the  
 13 moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The moving party has  
 14 the initial burden of demonstrating that summary judgment is proper. *Adickes v. S.H. Kress & Co.*, 398  
 15 U.S. 144, 157 (1970). The moving party must identify the pleadings, depositions, affidavits, or other  
 16 evidence that it "believes demonstrates the absence of a genuine issue of material fact." *Celotex Corp.*  
 17 v. *Catrett*, 477 U.S. 317, 323 (1986). "A material issue of fact is one that affects the outcome of the  
 18 litigation and requires a trial to resolve the parties' differing versions of the truth." *S.E.C. v. Seaboard*  
 19 *Corp.*, 677 F.2d 1301, 1306 (9th Cir. 1982).

20 The burden then shifts to the opposing party to show that summary judgment is not appropriate.  
 21 *Celotex*, 477 U.S. at 324. The opposing party's evidence is to be believed, and all justifiable inferences  
 22 are to be drawn in its favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). However, to  
 23 avoid summary judgment, the opposing party cannot rest solely on conclusory allegations. *Berg v.*  
 24 *Kincheloe*, 794 F.2d 457, 459 (9th Cir. 1986). Instead, it must designate specific facts showing there  
 25 is a genuine issue for trial. *Id.* More than a "metaphysical doubt" is required to establish a genuine  
 26 issue of material fact." *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586  
 27 (1986).

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2       **B. Wrongful Termination**

3           To establish a claim for wrongful termination in violation of public policy, Plaintiff must prove:

4       (1) he was employed by Defendant, (2) Defendant terminated Plaintiff's employment, (3) Defendant's  
 5       alleged violation of public policy was a motivating reason for the termination of Plaintiff's employment,  
 6       and (4) the termination of Plaintiff's employment caused him harm. Judicial Council of California Civil  
 7       Jury Instruction 2430. In this case, Plaintiff alleges three bases for his wrongful termination claim.  
 8       First, he asserts he was wrongfully terminated in violation of California Government Code § 12940(h).  
 9       Second, Plaintiff claims he was wrongfully terminated for complaining about Defendant's nonpayment  
 10      of overtime. Third, Plaintiff contends he was wrongfully terminated for protesting Defendant's  
 11      violation of California Insurance Code §§ 790.03(h)(1) and (3). The first basis for this claim is  
 12      subsumed by Plaintiff's second claim for retaliation, which the Court discusses below. A discussion  
 13      of the other two bases for Plaintiff's wrongful termination claim follows.

14       1. Overtime

15           With respect to the overtime issue, Defendant argues there is no evidence Plaintiff engaged in  
 16      any protected activity, and even if there was, there is no evidence of causation. Plaintiff disputes this  
 17      argument, and asserts that he "communicated his concern to Descher" that employees were working  
 18      overtime for which they were not being paid. (Mem. of P. & A. in Opp'n to Mot. at 13.) Were there  
 19      evidence to support this assertion, Plaintiff would have a valid argument that he engaged in protected  
 20      activity. *See Gould v. Maryland Sound Industries, Inc.*, 31 Cal. App. 4<sup>th</sup> 1137, 1149 (1995) (citing *Gantt*  
 21      *v. Sentry Ins.*, 1 Cal. 4<sup>th</sup> 1083, 1095 (1992)) ("overtime wages are another example of a public policy  
 22      fostering society's interest in a stable job market.") However, there is no evidence that Plaintiff made  
 23      such a complaint. Rather, Plaintiff states he "requested Descher to allow one of my overworked  
 24      subordinates, Saladino, to be allowed to work 4 hours of overtime. Descher refused this request."  
 25      (Decl. of Michael Malloian in Opp'n to Mot. ("Malloian Decl.") ¶ 6.) A request that an employee be  
 26      allowed to work overtime, and the employer's refusal of that request, is not the same as nonpayment of  
 27      overtime actually worked. While a complaint about the latter may be protected activity, a complaint

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1 about the former is not. Thus, Defendant is entitled to summary judgment on Plaintiff's wrongful  
 2 termination claim to the extent it relies on an overtime theory.

3       **2. California Insurance Code §§ 790.03(h)(1) and (3)**

4       The second theory underlying Plaintiff's wrongful termination claim is that his employment was  
 5 terminated because he complained about the use of "impact ratios" in employee performance reviews.  
 6 Specifically, Plaintiff states that in July 2009, Descher stated "that he 'wanted the West Coast to focus  
 7 more on increasing the number of denials and withdrawals of claims[,]'" to which Plaintiff responded  
 8 "that we should focus on each claim separately on a 'case by case' basis." (*Id.*) This issue came up  
 9 again in April 2010 when Descher "forwarded a spreadsheet to [Plaintiff] regarding the amount of  
 10 accepted, closed and denied claims." (*Id.* ¶ 8.) At that time, Plaintiff "cautioned [Descher] against  
 11 preparing these ratings, as [Plaintiff] believed they were unethical and illegal." (*Id.*) The following  
 12 month, Plaintiff "questioned why [Descher] was considering impact ratios in evaluating the performance  
 13 of Investigator Heather Yee." (*Id.*)

14       Defendant denies that it used "impact ratios" in evaluating the performance of its employees,  
 15 and it takes issue with the evidence in support of Plaintiff's claim. (Mem. of P. & A. in Supp. of Mot.  
 16 at 12-13.) However, Defendant fails to show the absence of a genuine issue of material fact to support  
 17 summary judgment in its favor. On the contrary, the evidence submitted, viewed in Plaintiff's favor,  
 18 reflects Plaintiff's expressed concern over Defendant's focus on the number of claims denied or  
 19 withdrawn, and the use of those statistics in employee performance reviews. (*See, e.g.*, Malloian Decl.  
 20 ¶ 8.) In light of this evidence, Defendant is not entitled to summary judgment on Plaintiff's wrongful  
 21 termination claim to the extent it relies on the use of "impact ratios."

22       **C. Retaliation**

23       Plaintiff's remaining claim is for retaliation. "In order to make a prima facie showing of  
 24 retaliation, the plaintiff must show that he engaged in a protected activity, that the employer subjected  
 25 him to an adverse employment action, and that a causal link exists between the protected activity and  
 26 the employer's action." *Villanueva v. City of Colton*, 160 Cal. App. 4<sup>th</sup> 1188, 1198-99 (2008) (citing  
 27 *Akers v. County of San Diego*, 95 Cal. App. 4<sup>th</sup> 1441, 1453 (2002)). Defendant here asserts Plaintiff  
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1 does not have evidence of the first element, therefore it is entitled to summary judgment on this claim.

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3       The facts surrounding Plaintiff's retaliation claim are disputed. Plaintiff asserts Descher made  
 4 an inappropriate comment about an employee's race, to which Plaintiff objected. Descher disputes that  
 5 he made the comment, but even assuming he made the comment, Defendant argues Plaintiff's objection  
 6 thereto was not protected activity. However, the Court disagrees. In *Alexander v. Gerhardt Enterprises, Inc.*, 40 F.3d 187 (7<sup>th</sup> Cir. 1994), the plaintiff submitted a memorandum to her supervisor concerning  
 7 his use of a racial slur during a company meeting. *Id.* at 190. The district court found that conduct  
 8 constituted "statutorily protected expression[,"] and the appellate court agreed. *Id.* at 195. Other courts  
 9 have reached the same conclusion. See *Andrews v. Fantasy House, Inc.*, 782 F.Supp.2d 753, 758-59 (D.  
 10 Minn. 2011) (finding plaintiff engaged in protected conduct when she objected to racist comment by  
 11 her manager); *Lyte v. South Central Connecticut Regional Water Authority*, 482 F.Supp.2d 252, 268-69  
 12 (D. Conn. 2007) (finding plaintiff engaged in protected conduct when he confronted supervisor about  
 13 racially disparaging comments); *Young v. Time Warner Cable Capital, L.P.*, 443 F.Supp.2d 1109, 1127  
 14 (W.D. Mo. 2006) (finding protected activity when plaintiff complained to management about  
 15 supervisor's remark about plaintiff's skin tone); *Rowland v. Franklin Career Services, LLC*, 272  
 16 F.Supp.2d 1188, 1207 (D. Kan. 2003) (complaint about racial slur sufficient to defeat summary  
 17 judgment of no protected activity). Thus, Defendant is not entitled to summary judgment based on a  
 18 lack of protected activity.<sup>2</sup>

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21       Nevertheless, Defendant argues it had legitimate, non-retaliatory reasons for terminating  
 22 Plaintiff's employment. Specifically, Defendant asserts it terminated Plaintiff's employment because  
 23 Plaintiff was engaging in disruptive, insubordinate and unprofessional conduct. Defendant submits  
 24 evidence to support this assertion, (see Notice of Lodgment of Exs. in Supp. of Mot., Exs., G, H, N),  
 25 which Plaintiff does not specifically dispute. Instead, Plaintiff argues there are genuine issues of  
 26 material fact about whether these reasons were simply a pretext for Defendant's retaliatory conduct.

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<sup>2</sup> The Court's finding that Plaintiff engaged in protected activity also defeats Defendant's motion for summary judgment on Plaintiff's wrongful termination claim to the extent it relies on a violation of California Government Code § 12940(h).

1 Plaintiff bears the burden of persuasion to show pretext. *Bodett v. CoxCom, Inc.*, 366 F.3d 736,  
 2 745 (9<sup>th</sup> Cir. 2004). To meet this burden, Plaintiff must introduce evidence from which a reasonable jury  
 3 could infer that Defendant did not fire him for the reasons set out above, but rather fired him in  
 4 retaliation for objecting to Descher's inappropriate comment about another employee's race. See  
 5 *Hernandez v. Spacelabs Medical Inc.*, 343 F.3d 1107, 1115 (9<sup>th</sup> Cir. 2003). Plaintiff can demonstrate  
 6 Defendant's "proffered reasons for firing him are pretextual 'either directly by persuading the court that  
 7 [the retaliatory] reason [for the decision] more likely motivated [Defendant] or indirectly by showing  
 8 that [Defendant's] proffered explanation is unworthy of credence.'" *Id.* (quoting *Texas Dep't of  
 9 Community Affairs v. Burdine*, 450 U.S. 248, 256 (1981)). Here, Plaintiff argues there is a genuine issue  
 10 of material fact on the issue of pretext based on Defendant's failure to comply with its discipline policy  
 11 and its failure to allow Plaintiff to explain the conduct giving rise to the termination of his employment.  
 12 Plaintiff also relies on the evidence supporting his prima facie case of retaliation.

13 Notably, Plaintiff fails to provide any evidence of Defendant's "progressive discipline policy."  
 14 (Mem. of P. & A. in Supp. of Opp'n to Mot. at 16.) Indeed, the evidence submitted by Defendant  
 15 indicates there is no such policy. (Notice of Lodgment of Exs. in Supp. of Mot., Ex. F at 364) (stating  
 16 "guidelines do not mandate a particular sequencing of discipline steps and do not mandate that each type  
 17 or class of violation must have a separate progressive track."); (*Id.* at 366) ("Management reserves the  
 18 right to take whatever action it deems appropriate, based on each particular set of circumstances.")  
 19 Thus, this argument does not assist Plaintiff in showing pretext.

20 Plaintiff's only other argument is that the evidence in support of his prima facie case supports  
 21 a finding of pretext. That evidence consists of Descher's comment on an employee's race, and  
 22 Plaintiff's objection to that comment. Noticeably absent, however, is any evidence that Smarrelli, or  
 23 any other employee of Defendant, was privy to this conversation between Plaintiff and Descher.  
 24 Plaintiff does not state that he informed any one else at the company about this conversation, and given  
 25 the alleged content of the conversation, there is no reason why Descher would have relayed this  
 26 conversation to his superiors or anyone else in the company. Absent evidence that anyone else was  
 27 made aware of this conversation, it could not have served as the basis for Defendant's termination of  
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1 Plaintiff's employment. In other words, Plaintiff has not come forward with sufficient evidence of  
2 pretext to withstand summary judgment on his retaliation claim.

3 **D. Punitive Damages**

4 Finally, Defendant asserts Plaintiff is not entitled to recover punitive damages because it had a  
5 written policy prohibiting discrimination. In support of this assertion, Defendant cites *Kolstad v. Am.*  
6 *Dental Ass'n*, 527 U.S. 526 (1999). That case, however, dealt with the availability of punitive damages  
7 for claims under Title VII. Here, Plaintiff's only remaining claim is for wrongful termination under  
8 California law. On this claim, Defendant has not shown that Plaintiff is barred, as a matter of law, from  
9 recovering punitive damages. Accordingly, Defendant's request to dismiss or strike Plaintiff's claim  
10 for punitive damages is denied.

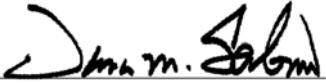
11 **III.**

12 **CONCLUSION**

13 For these reasons, the Court grants in part and denies in part Defendant's motion for summary  
14 judgment. Specifically, the Court grants Defendant's motion as to Plaintiff's claim for retaliation and  
15 his claim for wrongful termination to the extent it relies on any overtime issue. The Court denies the  
16 motion as to the other theories put forth in support of Plaintiff's wrongful termination claim, and with  
17 respect to Plaintiff's request for punitive damages.

18 **IT IS SO ORDERED.**

19 DATED: November 21, 2011

20   
21 HON. DANA M. SABRAW  
United States District Judge

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